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IN THE

Supreme Court of the United States

October Term, 1984

EDWARD T. WHALEN,

Appellant,

v.

DEAN STEEL ERECTION COMPANY, INC.,

Appellee.

JURISDICTIONAL STATEMENT

On Appeal to The
Supreme Court of Virginia

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QUESTION PRESENTED

Where a carpenter employed by a general contractor is crippled when a beam negligently stored by a steel subcontractor falls on him, and he draws worker's compensation from his own employer, but defendant subcontractor, by the terms of the Worker's Compensation Act, could never be required to pay under the Act, does refusal to permit his common law suit against the subcontractor deny the workman of property without due process of law, or of equal protection of the laws?[1]

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1. All parties in the courts below are listed in the caption.

TABLE OF CONTENTS

	Page
OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING AN APPEAL OR CERTIORARI.....	9
CONCLUSION.....	22
APPENDIX A (State Supreme Court Opinion).....	A1
APPENDIX B (Trial Court Opinion).....	B1
APPENDIX C (Special Plea).....	C1
APPENDIX D (Trial Court Order).	D1
APPENDIX E (State Supreme Court Order).....	E1
APPENDIX F (Notice of Appeal)..	F1

TABLE OF AUTHORITIES

CASES

Bosher v. Jamerson, 207 Va. 539, 151 S.E. 2d (1966)..... 11

Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673 (1930)..... 1, 22

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964)..... 1

Burroughs v. Walmont, 210 Va. 98 168 S. E. 2d 107 (1969)..... 11

Danna v. Economy Heat & Air Savers, 663 P. 2d 395 (Okla. App. 1983)..... 9, 21

Employers Ins. of Wausau v. Abernathy, 442 So. 2d 953 (Fla. 1983)..... 9, 20

Glona v. American Guarantee and Liability Ins. Co., 391 U.S. 73 (1968)..... 12

Grasse v. Dealer's Transport Co., 412 Ill. 179, 106 N.E. 2d 124 (1952), cert. den. 344 U.S. 837 (1952)..... 13

Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d. 437, 359 N.E. 2d 125 (1977)..... 9

Motchkavitz v. L.C. Boggs Industries, Inc., 407 So.2d 910 (Fla. 1981)..... 21

Mountain Timber Co. v. Washington, 243 U.S. 219 (1917)..... 2, 16

N.Y. Central Railroad v. White, 243 U.S. 188 (1917)..... 2, 14

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972)..... 13

Winters v. New York, 333 U.S. 507 (1948)..... 1

Younger and Miami Roofing & Sheet Metal Co. v. Kindt, 48 So.2d 840 (Fla. 1950)..... 21

OPINIONS BELOW

The opinions below is reported at ____ Va. ____, 327 S.E.2d 103 and appears as Appendix A at p. infra. The unreported trial court opinion is Appendix B, p. 1 infra.

JURISDICTION

This is a common law suit for personal injury.

The final judgment of the state supreme court was rendered March 8, 1985. A notice of appeal was filed May 28, 1985.

Jurisdiction is based on 28 U.S.C. §1257(2) and (3). Cases supporting jurisdiction include Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 5 (1964), Winters v. New York, 333 U.S. 507, 509 (1948), and Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 678 (1930).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Code of Virginia (1950):

> §65.1-30. Liability of contractor to workmen of subcontractor. -- When any person (..."contractor") contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (..."subcontractor") for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him...
>
> §65.1-41. Subrogation of employer to employee's rights against third parties; evidence; recovery; compromise. -- The making of a

lawful claim against an employer for compensation under this Act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party...

§65.1-5. Employees of independent contractors. -- Nothing in this Act contained shall be construed to make, for the purposes of this Act, the employees of an independent contractor the employees of the person or corporation employing or contracting with such independent contractor...

§65.1-40. Employee's rights under Act exclude all others. -- The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death...

STATEMENT OF THE CASE

Appellant, a carpenter employed by a general contractor building a store, was permanently injured when a huge beam negligently stored by defendant steel erection subcontractor, in the workplace, fell on him. He demanded trial by jury. The courts below denied trial, holding the state worker's compensation act, which required appellant's employer to pay limited benefits, and immunized his employer from common law suit, also immunized appellee, its subcontractor, which owed no actual or contingent obligations under the act to appellant. In both courts below, orally and in briefs, appellant urged that the statutory construction urged by appellee would violate the Fourteenth Amendment.

The constitutional argument was considered and expressly rejected by both courts (App. A, B, pp. A-6 , B-1).

All of plaintiff's Worker's Compensation Act benefits have been paid by his employer's insurer, not by defendant-appellee Dean Steel Erection Co. or its insurer, and Dean is insured against the negligence claim asserted in this action by another company. Thus, there has been no benefit coming from the defense interests to plaintiff - no "quid pro quo" - to support the immunity contended for.

Whether such windfall immunities are granted to Virginia worksite defendants, a situation not covered in terms by the Virginia Act, varies from case to case as described in the opinion below (pp. A6-11 infra), a variation in result which can only be described as

capricious. Acknowledging (but refusing to follow) the requirement of a quid pro quo which this Court has described to the bench and bar,[2] the court below finds it satisfied in the final paragraph of its opinion (p.A15-16 infra) in a most astounding manner -- that since a Virginia court might, in a similar situation, hold this appellant immune from the consequences of some workplace tort he might commit, the actual closing of the courtroom doors in this case is compensated for by the possible denial of access to the courts in some fancied other case against him. The court below cites no authority for this astonishing proposition, and ignored that cited to it contra.

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2. N.Y. Central R.R. v. White, 243 U.S. 188, 205-6 (1917); Mountain Timber Co. v. Washington, 243 U.S. 219, 241 (1917).

Professor Arthur Larson's treatise on Workmen's Compensation, §72.31, p. 14-111, says most states have "statutory-employer" or "contractor-under" statutes generally allowing tort immunity for contractors contingently liable for worker's compensation payments to the injured sub-contractor's employee.

"When the positions are reversed, and an employee of the general contractor...[like appellant here] sues the sub-contractor in negligence, the great majority of jurisdictions have held that the subcontractor is a third party amenable to suit". Id., §72.32, p.14-157. (Emphasis added here and below.) The reason for the difference in result is forthright: the general contractor has statutory liability to

the subcontractor's employee, actual or potential, while the subcontractor has no comparable statutory liability to the general contractor's employee.

"It might be thought that this distinction was too self-evident for further comment, but further analysis is necessitated by the evolution of a minority contra rule in Massachusetts through a bizarre series of cases, followed by Florida, holding both that the employee of the general contractor cannot sue a subcontractor, and that an employee of one subcontractor is barred from suing another subcontractor on the same job".

Both states mentioned, however, have abolished the rule complained of here -- Massachusetts legislatively, Larson, p. 14-160, n. 75, Florida

judicially on explicitly "quid pro quo," and thus implicitly constitutional, grounds. Employers Ins. of Wausau v. Abernathy, 442 So. 2d 953 (Fla. 1983). Accord, on express constitutional grounds, Danna v. Economy Heat & Air Savers, 663 P. 2d 395 (Okla. App. 1983); Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d. 437, 359 N.E. 2d 125 (1977).[3]

But Virginia remains in Larson's "bizarre" minority.

REASONS FOR GRANTING AN APPEAL

Appellant points out not only invidiously discriminatory application of statute as to him, but also that there are and will be many other seriously injured workers similarly

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3. Lafoon, Abernathy and Danna were cited to the court below, but are ignored in its opinion.

situated, in Virginia and other states, who likewise find and will find the courtroom doors barred unless the judgment below is reversed.

Virginia's resolution of the federal question stated above conflicts with these of at least two other state courts of last resort (pp. 19-21, infra). And while not contrary to a square holding of this Court in a case on all fours, it is clearly contrary to strong dicta in worker's compensation cases decided by this Court. The federal question is substantial because the large number of crippling industrial accidents caused by the fault of those not even fractionally compensating for them under worker's compensation acts interpreted as Virginia's was below.

There is no rational basis for distinguishing between two classes of

negligent worksite contractors none of whom are contingently liable to pay worker's compensation benefits to an employee of another contractor's on the job when, by baffling reasoning, one class is, and one is not, adjudged to constitute "other parties" within the meaning of §65.1-41 (p. 2-3 supra) who can be sued. See the court's discussion at pp. A infra. Thus, the negligent subcontractor and his insurer do not get a free ride if he negligently delivers materials, Burroughs v. Walmont, 210 Va. 98, 168 S. E. 2d 107 (1969), but does, as here, where he delivers and later plans to erect materials, or delivers and spreads them, Bosher v. Jamerson, 207 Va. 539, 151 S.E. 2d (1966) (p. infra).

Obviously Professor Arthur Larson is correct in observing that "because of

such fixed dollar ceilings on benefits, compensation awards are generally inadequate, both in relation to meeting the needs of the victims of industrial injury under current costs of living levels, and conspicuously in relation to standards that have grown up of what constitutes adequate damages in a personal injury action." 2 Larson, Law of Workmen's Compensation, §72.50, pp. 226.2-226.3.

Glona v. American Guarantee and Liability Ins. Co., 391 U.S. 73, 75 (1968), held that construing a state wrongful death statute to forbid suit for death of an illegitimate child denied his mother equal protection of the laws: "A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to

tort feasors." It is a similar windfall of which appellant complains here.

Applying the same principle to a state worker's compensation statute in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972), the Court said validity of a state rule of law under the equal protection clause "requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." There is no such relationship here.

Grasse v. Dealer's Transport Co., 412 Ill. 179, 106 N.E. 2d 124 (1952), cert. den. 344 U.S. 837 (1952), involved a section of the Illinois Workmen's Compensation Act which permitted a compensated employee to bring a common law action against a third-party tort-feasor if the latter was not bound by the Act, but not if he was bound. The

court found that this distinction deprived the plaintiff not only of equal protection of the laws but also of property without due process of law. 412 Ill. at 100, 106 N.E. 2d at 135.

The Illinois court rejected the argument that the invalidated section "was the '*quid pro quo*' for imposing liability without fault upon employers...The alleged "*quid pro quo* for imposing liability without fault upon employers to their employees is the scheduled and limited payments *the employers are required to pay their employees*, and *not* the *additional* bonus of limiting both the employer's and employee's common-law liability to third persons." 412 Ill. at 203, 106 N.E. 2d at 136-137.

Grasse cited *N.Y. Central Railroad v. White*, 243 U.S. 188, 201 (1917),

where this Court said it was not necessary, "for the purpose of the present case, to say that a state might, without violence to the constitutional guarantee of 'due process of law', suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute...It perhaps may be doubted whether the State could abolish all rights of action, on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it".

"It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards..., to

require him to contribute a reasonable amount...by way of compensation... irrespective of the question of negligence...". 243 U.S. at 203-4.

"This, of course, is not to say that any scale of compensation, however, insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute...is unreasonable in amount... Any question of that kind may be met when it arises." Id. at 205-6.

On the same day, in Mountain Timber Co. v. Washington, 243 U.S. 219, sustaining the Washington Act against due process attack, the Court said "the employer's exemption from liability to private action is an essential part of the legislative scheme and the quid pro

quo for the burdens imposed upon him, so that if the act is not valid as against employees, it is not valid as against employers." 243 U.S. at 234. The Court repeated what it said in the White case: "...We do not intend to say that any scale of compensation, however insignificant on the one hand, or onerous on the other, would be supportable and any question of that kind may be met when it arises." Id. at 241.

That question has arisen here and now.

In the landmark decisions sustaining against due process attack the interference which workmen's compensation acts impose upon traditional common law tort claims and defenses, the Court has found due process satisfied only by the exaction of a quid pro quo. Thus, here

plaintiff's actual employer, general contractor Pinkerton and Laws, is immune from whatever common law rights plaintiff might otherwise have against it because it has paid something in return - absolute liability, though on a limited scale of damages, under the express language of the Act.

There is no way appellee, a sub-contractor, could be made contingently liable to pay under the Act as a "statutory employer" if Pinkerton did not pay plaintiff. Sub-contractors like Dean are not contingently liable to injured employees of general contractors, like Pinkerton and Laws. Code of Virginia §§65.1-29, 65.1-30, 65.1-31, p. 2 supra.

Such a contingent liability, as of owner to injured contractor's employee, might be a quid pro quo, which would

excuse as not violative of due process the immunity from suit granted under the Act. Since such contingent liability is lacking here, there is no such quid pro quo, and thus granting immunity to defendant would deprive plaintiff of his property without due process. See the statements in the White and Mountain Timber cases, supra pp. 15-17, that a scale of compensation too "insignificant" might not be supportable against due process attack. Here the compensation available from defendant under the Act is nil.

In Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d 437, 359 N.E.2d 125, 128-30 (1977), the court went far beyond what we urge here and held that under a "statutory employer" law like Virginia's, injured employees of uninsured subcontractors, who received

worker's compensation under the Act from the general contractor, could also sue the latter for common law negligence. Contrary construction of the Act by lower courts was held to violate both equal protection and due process guarantees insofar as it immunized an employer from suits by anyone other than "their immediate employees."

In Employers Ins. of Wausau v. Abernathy, 442 So.2d 953, 954 (Fla. 1983), the Supreme Court of Florida said: "The justification for limiting liability or granting immunity is the substitution of something else in its place, a quid pro quo. The duty to provide workers' compensation benefits supplants tort liability to those injured on the job...If the duty to provide such coverage does not exist, then one has no reason to expect

immunity from wrongdoings committed against a third party." The dissent of Chief Justice Sundberg in Motchkavitz v. L.C. Boggs Industries, Inc., 407 So.2d 910 (Fla. 1981), is now correct, and we recede from Younger and Miami Roofing & Sheet Metal Co. v. Kindt, 48 So.2d 840 (Fla. 1950), thus allowing a third-party action against one who has no duty to afford compensation benefits."

In Danna v. Economy Heat & Air Savers, 663 P.2d 395, 397 (Okla. App. 1983), plaintiff and defendant were under contract with a university to do work on its theater. Plaintiff was struck by defendant's falling scaffold. Defendant said the Worker's Compensation Act provided "an exclusive remedy for injuries sustained by a worker while on the job where two separate entitles were working on a common task..."

"The radix of the problem," the Court said, "is a failure to respect or consider fundamental legal constituents...The act does not, and for that matter could not constitutionally, abrogate causes of action possessed by those not beneficiaries of it."

This case resembles Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 678 (1930), where the Court held in another context that the state supreme court had "denied to the plaintiff 'due process of law' -- using that term in its primary sense of an opportunity to be heard..."

CONCLUSION

The decisions below decided substantial and unsettled federal constitutional questions in an erroneous or at least doubtful manner, contrary to this Court's repeated condemnation of

arbitrary denial of equal protection and due process.

Petitioner has been invidiously discriminated against in being denied the right to litigate given others similarly situated. An appeal or certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A

PRESENT: All the Justices

EDWARD T. WHALEN

v. Record No. 820541

DEAN STEEL ERECTION COMPANY, INC.

OPININO BY JUSTICE CHARLES S. RUSSELL
March 8, 1985

FROM THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

Herbert A. Pickford, Judge

This appeal turns upon the question whether a general contractor's employee may bring a tort action against a subcontractor for personal injuries caused by the subcontractor's negligence on the job. The subcontractor contends that such an action is barred by the Worker's Compensation Act.

The facts are undisputed. The Kroger Company desired to erect a grocery store building in Charlottesville. Kroger

engaged Pinkerton and Laws Company as general contractor for the work. Pinkerton and Laws subcontracted the structural steel work to Dean Steel Erection Company, Inc., by a subcontract which provided that Dean Steel was to do "a complete job of steel erection" for the building.

Edward T. Whalen was a carpentry foreman employed by Pinkerton and Laws, the general contractor. On April 25, 1980, the date of his injury, he was working at the construction site, engaged in fabricating wooden forms into which concrete would be poured. His crew was responsible for installing reinforcing steel and pouring concrete into the forms when completed. Whalen's crew also set "anchor bolts" in the concrete, to which vertical steel columns would later be attached. On the date of the accident,

On the date of the accident, Whalen's carpentry crew, Dean Steel's crew, and the crew of a masonry subcontractor were working simultaneously inside the structure. The masonry walls were partially completed. Dean Steel's crew had erected some of the vertical columns and had placed on top of them fifteen of the nineteen horizontal steel girders which were ultimately to span the top of the structure from wall to wall. Dean Steel had stored the remaining four girders, which were about fifty feet long and five feet deep, inside the building. They rested on wooden supports which had been placed on the ground by Dean Steel's crew. Whalen was seriously injured when one of these girders "fell over," striking both his legs.

Whalen applied for and received benefits under the Worker Compensation

coverage carried by his employer, Pinkerton and Laws. While receiving disability benefits, he brought this action against Dean Steel, Contending that its negligence was the proximate cause of his injuries. Dean Steel filed a special plea, asserting that Whalen's sole remedy was under the Workers' Compensation Act. After hearing evidence, the court sustained the plea, finding that Dean Steel was "participating in the trade, business or occupation" of Pinkerton and Laws at the time of the injury, and that this action was therefore barred by the Workers' Compensation Act. On appeal, Whalen contends that the employee of a general contractor is not barred from suit against a subcontractor for the latter's negligence on the job, and that a construction of the Workers' Compensation Act that would so bar him

is unconstitutional.

We have considered the underlying question in many cases. The test to be applied was most recently set forth in Stewart v. Bass Constr. Co., 223 Va. 363, 288 S.E. 2d 489 (1982).

Code § 65.1-40 states that the rights and remedies granted under the Workmen's Compensation Act "shall exclude all other rights and remedies" of an employee to recover for an injury received during the course of his employment. Code § 65.1-41 provides, however, that an employee can maintain an action at law against the person causing his injury, provided such person is an "other party." Our task is to determine whether Bass was an "other party."

The test to be applied in the present case was first stated in Feitig v. Chalkey, 185 Va. 96, 38 S.E. 2d 73 (1946). There we said that in order to maintain a common law action the defendant had to be a stranger to the trade, occupation, or business in which the plaintiff was involved. This test has been restated and applied numreous times. See, e.g., Stout v. Onorati, 221 Va. 143, 267 S.E. 2d 154 (1980); Bosher v. Jamerson, 207 Va. 539, 151 S.E. 2d 375 (1966); Rea, Administratrix v. Ford, 198 Va. 712, 96 S.E. 2d 92 (1957); Sykes v. Stone & Webster Eng. Corp., 186 Va. 116 41 S.E. 2d 469 (1947). Its application depends

upon the facts and circumstances of the particular case. Bassett Furniture v. McReynolds, 216 Va. 897, 902, 224 S.E. 2d 323, 326 (1976).

Id. at 365, 288 S.E. 2d at 490.

Rea, Administratrix v. Ford, cited in Stewart, is factually similar to the present case. An employee of a general contractor engaged in the construction of a school building was killed by a falling steel truss which was being hoisted by a subcontractor's employee. The subcontractor was engaged for the purpose of providing the necessary crane and crew to lift the steel trusses into place. We affirmed the trial court's judgment striking the evidence of the decendent's personal representative in a common-law action against the subcontractor on the ground that such an action was barred by the Workmen's Compensation Act. The result followed from the fact that the subcontractor was no stranger

to the employment and the work. We said:

> In the present case, Ford, (the subcontractor), was no stranger to the business of Daniel, the principal contractor. On the contrary, in furnishing the equipment and crew for the purpose of erecting the steel structure Ford was a subcontractor engaged in an essential part of the work which the principal contractor had to do. Thus he was not an "other Party" within the meaning of Code, §65-38 (now Code § 65. 1-41). Like the principal contractor, Ford was under the canopy of the Workmen's Compensation Act and not subject to an action at law for damages for injury to or death of Rea who was engaged in the same work.

198 Va. at 717, 96 S.E. 2d at 96.

The"stranger to the work" test, applied to varying facts, necessarily produces varying results. Thus, in Hipp v. Sadler Materials Corp., 211 Va. 710, 180 S.E. 2d 501 (1971), and in Burroughs v. Walmont, 210 Va. 98, 168 S.E. 2d 107 (1969), subcontractors were found to be outside the canopy of Worker's Compensation, and therefore subject to suit, because their duties consisted simply

of delivering materials to a construction site, without participation in the construction work. But where a subcontractor had mixed duties, some involving mere deliveries of materials and others directly involved in the construction work, we held that he was within the canopy of Worker's Compensation, and not subject to an action for negligence at the hands of an employee of the general contractor.

In Bosher v. Jamerson, 207 Va. 539, 151 S.E. 2d 375 (1966), an employee of an industrial building was injured when struck by a truck operated by the employees of a subcontractor engaged in hauling sand to the construction site. Although the plaintiff had recovered Worker's Compensation benefits from his employer, the general contractor,he sued the subcontractor for negligence. The trial court over-

ruled the subcontractor's plea in bar, and the plaintiff recovered a judgment. We reversed and entered final judgment for the subcontractor because his duties included not only hauling sand to the construction site and dumping it there, but also spreading it inside the foundation area to establish a sand base six inches deep. The latter activity, we held, was "part of the trade, business or occupation" of the general contractor. The subcontractor was, therefore, no stranger to the general contractor's work and not an "other party" within the meaning of Code § 65-38(now Code §65.1-41). As a consequence, the plaintiff's remedy was limited to Worker's Compensation. Id. at 542-43, 151 S.E. 2d at 377-78.

It is clear from a comparison of these precedents that the rule of Feitig v. Chalkley, 185 Va. 96, 38 S.E. 2d 73

(1946), has become firmly fixed in Virginia. It requires that the facts of each case be analyzed to determine whether the defendant in a common-law action was, at the time of the plaintiff's injury, a stranger to the work in which the plaintiff was engaged. If the defendant was "no stranger," then he was not an "other party" within Code §65.1-41, and the common-law action against him is barred by Code § 65.1-40. There is no clearer illustration of this principle than the case of a subcontractor who has undertaken to perform a fraction of the construction work for which a general contractor has overall responsibility.

Here, as in Rea, the defendant was a subcontractor engaged in an essential part of the work which the general contractor had to do. Dean Steel was no stranger to the work in which Whalen's

employer was engaged, but was, on the contrary, performing an essential part of it. Dean Steel was, therefore, under the canopy of the Worker's Compensation Act when Whalen was injured, and the trial court correctly ruled that this action was barred.

Whalen, however, conceding that the "stranger to the work" test prevades our previous holdings, contends that a competing and better-reasoned test is found in Southeastern Tidewater Auth. v. Coley, 221 Va. 859, 275 S.E. 2d 589 (1981), based upon Shell Oil Co. v. Leftwich, 212 Va. 715, 187 S.E. 2d 162 (1972), and Bassett Furniture v. McReynolds, 216 Va. 897, 224 S.E. 2d 323 (1976). This test, the argument continues, depends not on whether the subcontractor is a stranger to the work, but rather upon whether the subcontractor's activitiy is

one normally carried out by the owner or general contractor through employees, instead of one customarily entrusted to a subcontractor. Whalen misapplies these authorities. Southeastern, Shell Oil, and Bassett stand in a line of cases beginning with Sykes v. Stone & Webster Eng. Corp., 186 Va. 116, 41 S.E. 2d 469 (1947), which consider whether a subcontractor's employee, injured by a general contractor's (or owner's) negligence on the job, may sue such general contractor or owner at common law or whether such general contractor or owner has become the statutory employer of the plaintiff under Code §§65.1-29, 65.1-30, or 65.1-31, or their predecessors. These statutory employer cases present a question which is the obverse of the one presented here, and their rule is inapplicable where a general contractor's employee seeks to sue a subcontractor. Professor Arthur

Larson, quoted in Shell Oil, makes the distinction clear: "The test (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether this indispensable activity is, in that business, normally carried on through employees rather than independent contractors." Shell Oil, 212 Va. at 722, 187 S.E. 2d at 167 (quoting 1C A. Larson, the Law of Workmen's Compensation § 49.12 at 9-53 (1982)) (emphasis added).

Whalen tacitly admits that this case is controlled by Rea. Administratrix v. Ford, if that authority is followed, but argues that the holding in that case was faulty on constitutional grounds, and that any construction of the Worker's Compensation Act which deprives him of the right to sue a subcontractor denies him due process, equal protection of the

laws, and the right of trial by jury. We do not agree. In adopting the Compensation Act, the legislature provided for the payment of statutory compensation to workers for injuries arising out of and in the course of the employement. The claimant is relieved of the necessity of proving negligence and proximate cause. He is also relieved of any need to resist such affirmative defenses as contributory negligence and assumption of the risk. In exchange, the law relieves the employer of exposure to actions at law from employees sustaining such injuries. Many cases, weighing this quid pro quo, have held it to be a fair exchange, beneficial to employer, employee and society at large, and in itself sufficient to satisfy constitutional requirements. See, e.g., New York Central R.R. Co. v. White, 243 U.S. 188 (1917); Northern P. Ry. v. Meese,

239 U.S. 614 (1916); Bergen v. Fourth Skyline Corporation, 501 F 2d 1174 (4th Cir. 1974); Haynes v. James H. Carr. Inc., 427 F. 2d 700 (4th Cir.) cert. denied, 400 U.S. 942 (1970). See also Fauver v. Bell, 192 Va. 518, 65 S.E. 2d 575 (1951); Humphrees v. Boxley Bros. Co., 146 Va. 91, 135 S.E. 890 (1926).

Whalen contends that this case differs from the statuatory employer cases in that Dean Steel had no obligation to pay him workers' compensation benefits because it was neither his employer nor his statutory employer, and that Dean Steel should not, therefore, be entitled to the constitutionally-sanctioned quid pro quo of immunity from suit. We do not agree. The quid pro quo which protects the Compensation Act from constitutional attack is of larger dimensions. It is a societal exchange, benefitting all employers and all employees who stand

together under the canopy of the Compensation Act. Its effect is to guarantee compensation to all injured workers under the canopy and to bar common-law suit against all employers also thereunder. As long as the injured worker has recourse to compensation from his own employer, or a statutory employer, he has the benefit of the quid pro quo upon which the compensation scheme is based, and it is immaterial whether he would have been entitled to claim compensation from other employers who are also under the canopy of the Act. Accordingly, we conclude that the result reached by the trial court did not infringe Whalen's constitutuonal rights.

The judgment appealed from will be

Affirmed.

APPENDIX B

I have reviewed the authorities you cited as well as a 1980 opinion of the Virginia Supreme Court styled Stout v. Onorati, 221 Va. 143. The last mentioned case, while not factually similar to the one in question, does have an interesting discussion of some of the authorities cited by you as they relate to one of the questions confronting us, i.e. whether the defendant, at the time of plaintiff's injury, was participating in the trade, business or occupation of Pinkerton & Laws, the general contractor. From the evidence before me, I conclude that the defendant was so engaged, and therefore his special plea should be sustained. Furthermore, I am of the opinion that the statutory prohibition to plaintiff's claim is not unconstitutional. Mr. Bell will draft an order consistent with this opinion

providing for dismissal of this suit.

APPENDIX C

The defendant, Dean Steel Erection Company, Inc., by counsel, files this special plea to the Motion for Judgment and asks that this action be dismissed for the reason that the plaintiff was compensated for the injuries claimed in this action under the Virginia Workmen's Compensation Act (the Act), and that under the circumstances of this action, the plaintiff's remedy is exclusively under the Act such that the plaintiff has no cause of action against the defendant for the injuries claimed herein.

APPENDIX D

This cause came on this day to be heard upon the plaintiff's Motion for Judgment and upon the defendant's Special Plea requesting dismissal of this action on the basis that the plaintiff's sole remedy is pursuant to the Virginia Workmen's Compensation Act and that, having received workmen's compensation benefits, the plaintiff is barred from pursuing a cuase of action against the defendant.

The Court having considered fully the evidence presented by the parties ore tenus on October 30, 1981, the written and oral arguments of counsel, and the applicable authorities, does find as follows:

1. That at the time of plaintiff's injury, both the plaintiff and the defendant were engaged in the trade,

business, or occupation of the Pinkerton and Laws Company, the general contractor for the Kroger Company's building in the City of Charlottesville, Virginia.

2. That the defendant is not, therefore, an "other party" as defined by the provisions of the Virginia Workmen's Compensation Act.

3. That the plaintiff is, therefore, barred by the provisions of the Virginia Workmen's Compensation Act from maintaining this action against the defendant.

4. That the provisions of the Virginia Workmen's Compensation Act which prohibit the plaintiff from maintaining this action are not in violation of the due process requirements of the United States or Virginia Constitutions.

The Court having so found, it is ORDERED that defendant's Special Plea be and it hereby is sustained and that this action be and it hereby dismissed with prejudice to the plaintiff, to all of which the plaintiff has noted his objection and exception, on the grounds that the Workmen's Compensation Act; decisions construing it, and the 14th Amendment to the United States Constitution, and the Virginia Bill of Rights are violated by barring plaintiff's action.

And it appearing that there is nothing further to be done in this case, it is ORDERED striken from the docket and placed with the ended causes of this Court.

Enter: Herbert A. Pickford
Judge

Date: December 28, 1981

APPENDIX E

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed. The appellant shall pay to the appellee thirty dollars damages and the costs expended herein.

APPENDIX F

IN THE SUPREME
COURT OF VIRGINIA AT RICHMOND
Record No. 820541

Edward T. Whalen,

Appellant,

v.

Dean Steel Erection Company, Inc.,

Appellee

NOTICE OF APPEAL

Appellant Edward T. Whalen respectfully appeals to the Supreme Court of the United States to the judgment of this Court rendered March 8, 1985, or, in the alternative, will seek a writ of certiorari thereto, insofar as this Court's application of the Virginia

Worker's Compensation Act was held not violative of the Fourteenth Amendment to the United States Constitution appeal lies under 28 U.S.C. §1257(2).

Edward T. Whalen

Of Counsel for
Appellant

CERTIFICATE

Copies of the foregoing Notice were filed in the Office of the Clerk, Supreme Court of Virginia, on the 28 day of May, 1985, and that on or before the same date copies of the same were mailed to Thomas G. Bell, Jr., counsel for Appellee, Post Office Box 2566, Staunton, Virginia 24401, and to the Clerk of the Circuit Court of Charlottesville, Virginia, wherein the record lies.

F2

84-1901

NO.

Supreme Court, U.S.
FILED
JUN 28 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD T. WHALEN,
Appellant

v.

DEAN STEEL ERECTION COMPANY, INC.,
Appellee

ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

MOTION TO DISMISS

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION	2
1. The Constitutional argument raised by Whalen has been previously raised and has been rejected by this Court.	2
2. The Virginia Worker's Compensation Act does not deny Whalen due process or equal protection of the laws.	6
CONCLUSION	13
CERTIFICATE	14

TABLE OF AUTHORITIES

CASES

Bergen v. Fourth Skyline Corporation, 501 F.2d 1174 (4th Cir., 1974) 6

Danna v. Economy Heat & Air Savers, 663 P.2d 395 (Okla. App. 1983) 12

Employers Ins. of Wausau v. Abernathy, 440 So.2d 953 (Fla. 1983) 12

Feitig v. Chalkley, 185 Va. 96, 38 S.E. 2d, 73 (1948) 9,10

Haynes v. James H. Carr, Inc, 427 F.2d 700 (4th Cir.) Cert. Denied, 400 U.S. 942 (1970) 5,6

Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d 437, 359 N.E. 2d 125 (1977) 12

Levy v. Louisiana, 391 U.S. 68 (1968) 8

Morey v. Doud, 354 U.S. 457 (1957) 8

Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) 7

New York Central R.R. Co. v. White, 243 U.S. 219 (1917) 7

Northern Pacific Railway Co. v. Meese, 239 U.S. 614 (1915) .... 3,6,8, ... 13

CODE SECTIONS

Section 65.1-30, Code of Virginia 11

Section 65.1-40, Code of Virginia 8

Section 65.1-41, Code of Virginia 9

Section 65.1-103, Code of Virginia 2,9

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD T. WHALEN,
Appellant

v. Case No. 84-1901

DEAN STEEL ERECTION
COMPANY, INC.,
Appellee

MOTION TO DISMISS

Appellee, Dean Steel Erection Company, Inc., moves the Court to dismiss the appeal of Edward T. Whalen for failure to present a substantial federal question, because the issues raised by Appellant have been previously decided by the rulings of this Court and were properly decided below.

PRELIMINARY STATEMENT

Appellee concurs in the Question Presented, the List of Parties, the Opinions Below, and the Statement of Jurisdiction presented by the Appellant.

It concurs in the Constitutional and Statutory Provisions Involved, but would add the following statute:

> Code of Virginia (1950), §65.1-103. Duty to insure payment of compensation; effect of insurance.--Every employer subject to the compensation provisions of this Act shall insure the payment of compensation to his employees in the manner hereinafter provided. While such insurance remains in force he or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified. . . .

Appellee concurs in the Statement of the Case presented by Appellant, except to the extent that it constitutes argument. Appellant will hereinafter be referred to as "Whalen". Appellee will hereinafter be referred to as "Dean Steel".

THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

1. The Constitutional argument raised by Whalen has been previously

raised and has been rejected by this Court.

Whalen challenges the constitutionality of the Virginia Worker's Compensation Act on the basis that it provides protection from a common law personal injury suit to Dean Steel even though Dean Steel as a subcontractor of Whalen's employer has no potential liability to Whalen for worker's compensation benefits. Whalen argues that a party can only be protected from a common law personal injury suit if that party is either primarily or contingently liable for the payment of worker's compensation benefits.

This Court considered and rejected such a claim in the early days of worker's compensation statutes in Northern Pacific Railway Co. v. Meese, 239 U.S. 614 (1915). In that case, Meese was killed in the course of his

employment by a Seattle brewer, allegedly as the result of the negligence of Northern Pacific Railway Co. His heirs brought suit against the railway company. The railway company claimed protection of the Washington Worker's Compensation Act which provided that it was the sole remedy for injured workmen and provided immunity from suit for all entities if the injury occurred in the workplace.

This Court rejected Meese's contention that extending protection from suit to the railway company, which was neither his employer nor connected in any way with his job, violated the Equal Protection Clause of the Fourteenth Amendment. It held that a state could in the proper exercise of its legislative power give protection from suit to a defendant who had no liability for worker's compensation payments.

The Meese case, which is cited by the Court below, is ignored by Whalen, though he raises precisely the same question.

The challenge presented by Whalen to the Virginia Worker's Compensation Act has twice been considered and rejected in recent years by the Court of Appeals for the Fourth Circuit. In Haynes v. James H. Carr, Inc., 427 F.2d 700 (4th Cir.) Cert. Denied, 400 U.S. 942 (1970), Whalen's argument was rejected in a case which is indistinguishable on its facts from the present case. Haynes was a carpenter employed by a general contractor. A roof truss fell and injured him. He brought suit against Carr, who had constructed and erected the roof truss. The Fourth Circuit concluded that "Haynes' argument that the Virginia Workmen's Compensation Act is unconstitutional is foreclosed by

Northern P. Ry. v. Meese, 239 U.S. 614, 620, 36 S. Ct. 223, 60 L. Ed. 467 (1916)."

A petition for certiorari was rejected in the Haynes case.

Again in 1974, the Fourth Circuit rejected Whalen's argument in Bergen v. Fourth Skyline Corporation, 501 F.2d 1174 (4th Cir., 1974).

Since this Court rejected Whalen's constitutional argument in 1915 and declined to reconsider it in 1970, the constitutionality of the Virginia statute which protects Dean Steel from common law suit is well established. No substantial federal question is raised.

2. The Virginia Worker's Compensation Act does not deny Whalen due process or equal protection of the laws. A basic component of most, if not all, worker's compensation acts is a compromise by which an injured worker

receives benefits, which are limited by statute, regardless of whether the employer is at fault and, in return, gives up his common law right to file a personal injury suit. Whalen has participated in the compromise by receiving extensive worker's compensation benefits.

This basic trade-off has long since withstood attack on due process grounds. New York Central R.R. Co. v. White, 243 U.S. 219 (1917), Mountain Timber Co. v. Washington, 243 U.S. 219 (1917). The fact that Whalen has access to worker's compensation benefits for his on-the-job injury satisfies due process requirements and precludes any argument that he has been deprived of his right to sue without receiving anything in return.

The thrust of Whalen's constitutional argument is based in the equal

protection clause contained in the Fourteenth Amendment. Even without the rejection of his argument in Northern Pacific Ry. v. Meese, supra, his claim is without merit.

The test to be applied has been stated often. States have broad power and discretion to make classifications so long as they are reasonably related to the purposes for which a statute is adopted, are not purely arbitrary, and have a rational basis. Classifications may not be invidiously discriminatory. Morey v. Doud, 354 U.S. 457, 463-465 (1957), Levy v. Louisiana, 391 U.S. 68, 71 (1968). The classification made by the Virginia statute easily passes the established test.

Section 65.1-40 of the Code of Virginia, 1950, (Jurisdictional Statement, p.3) provides that an employee who accepts worker's compensation benefits

gives up "all other rights and remedies . . . at common law or otherwise, on account of such injury . . . ". This broad prohibition is narrowed by §65.1-41 of the Code of Virginia, 1950, (Jurisdictional Statement pp.2-3) allowing the injured employee and his employer together to pursue such rights and remedies against "any other party." Section 65.1-103 of the Code of Virginia, 1950, extends the protection of the Act to the employers of injured workers and "those conducting his business," making it clear that the protection extends to subcontractors and others beyond the direct employer.

In the 1948 case of Feitig v. Chalkley, 185 Va. 96, 38 S.E.2d 73 (1948) the Supreme Court of Virginia first set forth its test to determine who would be protected from suit as "those conducting [the] business" of an

employer and who would be an "other party" and not protected. Interpreting the statute, the Court concluded that all persons or entities engaged in the trade, business or occupation of a general contractor would be protected, but that those who were "strangers to the business" would not be. 185 Va. at 102, 38 S.E.2d at 75-76.

In the four decades following Feitig v. Chalkley, supra, the Virginia Court has consistently applied the test, determining on a case by case basis whether or not alleged tortfeasors were engaged in the work of the injured worker's employer. Many of those cases are cited in the opinion below.

As discussed in the opinion below, the Virginia Worker's Compensation Act has created a canopy and has placed under it all employees engaged together on an industrial project regardless of

the identities of their direct employers and has extended the protection of the Worker's Compensation Act to those employers under the canopy. It has not extended the protection to those not engaged in a particular project and thus outside the canopy. It treats all persons working on an industrial project alike, regardless of the status of their direct employers as general contractors or subcontractors. Clearly this classification has a rational basis -- to have the Act apply exclusively to those on the job, but not to those unrelated to it. It is, therefore, immune from constitutional attack.

The result urged by Whalen would, in fact, create a discriminatory classification. If the general contractor would be immune from suit because of his status as statutory employer of all workers on the project (Virginia Code

Section 65.1-30) and subcontractors were not immune, workers laboring together toward a common goal but on the payroll of different employers would be treated differently, some able to sue and others not. That classification would not have a rational basis.

The state law cases cited by Whalen simply do not apply. Two of them, Employers Ins. of Wausau v. Abernathy, 440 So.2d 953 (Fla. 1983) and Danna v. Economy Heat & Air Savers, 663 P.2d 395 (Okla. App. 1983) are not decided on constitutional grounds but on interpretations of state statutes. The third, Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d 437, 359 N.E. 2d 125 (1977) involved a classification which discriminated on the basis of whether or not employers similarly situated had insurance. It has no application here.

The Virginia statutory scheme does

not deny equal protection of the laws or due process to injured Virginia workers. It withstands attack independently of the decision in Northern Pacific Ry. v. Meese, supra.

CONCLUSION

For the reasons stated, Appellee, Dean Steel Erection Company, Inc., moves the Court to dismiss this appeal as not presenting a substantial federal question and as having been properly decided below.

Respectfully submitted,

Thomas G. Bell, Jr.

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Counsel of Record for
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Company, Inc.

CERTIFICATE

This is to certify that I have this day served three copies of the foregoing Motion to Dismiss upon counsel for the opposing party pursuant to Rule 33(3) of the Rules of the Supreme Court of the United States, by mailing three copies in an envelope addressed to: Gary W. Kendall, Michie, Hamlett, Donato & Lowry, Post Office Box 298, Charlottesville, VA, 22902, and James A. Eichner, Beale, Eichner, Wright, Denton & Balfour, 1 North Fifth Street, Richmond, VA, 23219.

Given under my hand this 28th day of June, 1985.

Thomas G. Bell, Jr.

Thomas G. Bell, Jr.